STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY L. FREDERICK,

Defendant-Appellant.

UNPUBLISHED
July 24, 2003

No. 239982
Wayne Circuit Court
LC No. 01-005320

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89, and was sentenced to a prison term of three to fifteen years. Defendant appeals as of right. We affirm.

Defendant first claims that the evidence presented was insufficient to sustain his conviction. The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant was armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). The Legislature has not defined "assault," so its elements are determined by the common law. *People v Reeves*, 458 Mich 236, 239; 580 NW2d 433 (1998). Michigan has adopted the majority rule, according to Perkins on Criminal Law (2d ed), p 117, that "a simple criminal assault" is made out from either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *Reeves, supra* at 40, quoting *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978). Thus, an assault can be committed either by committing a forceful act that causes immediate injury to another or by committing a forceful act that makes another reasonably afraid of being injured.

Defendant asserts that the prosecutor failed to establish that defendant was armed and failed to establish that the victim was injured. We disagree. Viewed in a light most favorable to the prosecution, *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), the evidence showed that defendant had a glass bottle in his pocket and that he stated that he had a gun and put his hand in the pocket. Defendant also put his hand behind his back, as if he had a gun behind him, and repeated that he had a gun. The victim testified that she was afraid because she

thought that defendant was going to pull a gun. This evidence was sufficient to allow a rational trier of fact to find that defendant used an article to induce a reasonable belief that it was a dangerous weapon. *People v Saenz*, 411 Mich 454, 458; 307 NW2d 675 (1981).[1] Further, contrary to defendant's assertion, physical injury is not required to prove the assault element of the offense. *Reeves, supra.*

Defendant next claims that the jury's verdict was against the great weight of the evidence. Because we have already concluded that the evidence was sufficient to support a finding that defendant used an article to induce a reasonable belief that it was a dangerous weapon, this argument is without merit. *People v Stiller*, 242 Mich App 38, 52; 617 NW2d 697 (2000).

Defendant next argues that the trial court erred when it refused to instruct on the lesser offenses of attempted armed robbery and attempted unarmed robbery. The trial court refused to give the instructions because defendant only requested the instructions after the jury had begun its deliberations. Because defendant did not timely request the instructions, we will review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich. 750, 763-765; 597 NW2d 130 (1999).

Where an instruction is given for an intermediate lesser included offense, and the jury returns a guilty verdict for the greater offense, failure to instruct on another lesser offense may be harmless. *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990). Because the jury found defendant guilty of the greater offense of assault with intent to rob being armed, when it could have found defendant guilty of assault with intent to rob being unarmed, the trial court's failure to instruct on attempted unarmed robbery was harmless. *Id.* Hence, defendant has not shown plain error.

Had defense counsel timely requested an instruction on the necessarily included lesser offense of attempted armed robbery, the trial court would have been obligated to give the instruction only if the charged greater offense required the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).[2] The distinguishing element between the greater offense of assault with intent to rob while armed and the lesser offense of attempted armed robbery is the element of assault. Because there was no dispute at trial that defendant told the victim that he had a gun and that he put his hand in his pocket, and because the victim testified that she feared that defendant was going to pull a gun, the element of assault was not in dispute, and a rational view of the evidence did not support giving this lesser instruction. Again, defendant has not shown plain error.

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[1] It was not until after the victim had been assaulted that she learned that the item defendant had in his pocket was a glass bottle and not a gun.

[2] "Our decision in this case is to be given limited retroactive effect, applying to those cases pending on appeal in which the issue has been raised and preserved." *Cornell, supra* at 367. An appeal had been filed in the case at hand when *Cornell* was decided.

Defendant next claims he was denied a fair trial as a result of several instances of prosecutorial misconduct. We review de novo claims of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, we review unpreserved claims for plain error. *Id.*

Defendant first argues that the prosecutor impermissibly commented about defendant's failure to testify when the prosecutor referred to "uncontroverted evidence" during closing argument. We disagree. A prosecutor may argue that inculpatory evidence is undisputed without violating a defendant's right against self-incrimination, *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996), even where a defendant is the only one who can contradict testimony. *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991).

Defendant next argues that the prosecutor improperly argued facts not in evidence when he stated that defendant told the victim four or five times that he had a gun, and the victim had nightmares about the incident. A prosecutor may not argue facts unsupported by evidence. *People v Fisher*, 193 Mich 284, 291; 483 NW2d 452 (1992). Nevertheless, unpreserved claims of prosecutorial misconduct will not be reversed where prejudice could be cured by an instruction. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Here, the prosecutor's comments did not relate to the elements of the crime, and any prejudice resulting from the prosecutor's comments could have been cured by a timely instruction. Therefore, defendant has not demonstrated plain error affecting his substantial rights.

Defendant also argues that the prosecutor improperly stated that the jury "consider the less serious charge if you don't believe that he had an article fashioned as a weapon, that his hand in his pocket or the bottle was an article fashioned to use as a weapon to use to put fear in the mind of the victim . . . " Defendant contends that this statement improperly advised the jury that it could consider defendant's hand or the bottle in his pocket as an article fashioned as a weapon. We disagree. Defendant failed to object below, and our review is thus for plain error. In addressing the lesser charge of assault with intent to rob unarmed, the prosecutor seemed to treat the bottle and defendant's hand the same. However, the prosecutor repeatedly stated that the judge would state the law, and that the jury should ignore anything the prosecutor said to the contrary. The court also repeated this admonition. The court's instructions made clear that in order to find defendant guilty of assault with intent to rob while armed, the jury would have to find that defendant was armed with a weapon or an object used or fashioned in a manner to lead the person assaulted to reasonably believe that it was a dangerous weapon. We find no plain error.

Defendant also claims the prosecutor improperly argued facts not in evidence when he stated, "As [defense counsel] told us yesterday, it's never an issue that the defendant was there." The prosecutor's statement referred to an earlier colloquy that occurred when the prosecutor attempted to introduce identification testimony:

> Defense Counsel: Your Honor, you know, my client has never not admitted that he was at the scene. I don't know why it's necessary to go through lineup testimony.
>
> Trial Court: He hasn't admitted yet, Counsel, so it's their obligation to prove their case. They have a right to proceed.

> Defense Counsel: Well, just for the record, then, my client doesn't dispute any of the testimony here.

A party may not stipulate evidence and then argue that its admission was error. *People v McCray,* 210 Mich App 9, 14; 533 NW2d 359 (1995). The prosecutor's brief reference to defense counsel's statement was not erroneous.

Defendant next claims that the trial court failed to affirmatively establish on the record that defendant waived his right to testify. We disagree. A Michigan trial court is not required to determine on the record that a defendant has knowingly and voluntarily waived his right to testify. *People v Drake,* 190 Mich App 652, 661-662; 476 NW2d 767 (1991).

Defendant's next argument on appeal is that the trial court erred in denying his motion for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). The purpose of an evidentiary hearing is to make a record factually supporting a defendant's claim of ineffective assistance of counsel. *Id.* at 443. The record reveals that the trial court was given a hearing on his motion for new trial. The trial court apparently concluded that an evidentiary hearing was not necessary to review defendant's claims, and made a ruling on each claim. The absence of an evidentiary hearing is not fatal to defendant's claim of ineffective assistance of counsel where the details of the alleged deficiencies are sufficiently contained in the record as to permit this Court to reach and decide the issue. *People v Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985). Here, the alleged errors are apparent from the record, and the record is sufficient for review. Therefore, the trial court did not err by failing to conduct a full evidentiary hearing.

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). While a trial court's findings of fact are reviewed for clear error, questions of constitutional law are reviewed by this Court de novo. *Id*. In order for a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To prove deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prove prejudice, a defendant must affirmatively demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id*. at 302-303. Defense counsel's performance must be evaluated against an objective standard of reasonableness without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Furthermore, effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first claims counsel was ineffective when he failed to move for a directed verdict, to timely request instructions on lesser included offenses, and to challenge the prosecutor's reference to evidence. We disagree. Because the evidence was sufficient to support the conviction, no error resulted from counsel's failure to move for a directed verdict. Further, we have already concluded that no error resulted from the failure to instruct the jury on lesser included instructions or from the prosecutor's comments at trial.

Defendant also claims that he was denied the effective assistance of counsel by his counsel's reference to a prior ruling on the admissibility of defendant's confession. The reference was arguably a strategic attempt to cast doubt on the confession's reliability, and trial strategy will not be assessed using hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Further, because defendant's defense was that he was not armed and did not have the intent to rob, counsel was not ineffective for failing to contest the identification testimony.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White